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No. 95-

In The

Supreme Court of the United States

October Term, 1995

THE PILLSBURY COMPANY, INC.,

Petitioner,

v.

THE PORT OF CORPUS CHRISTI AUTHORITY,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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84 pp

QUESTION PRESENTED

1. Does the analysis announced by this Court in *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. ___, 115 S.Ct. 394 (1994), for determining a governmental entity's entitlement to Eleventh Amendment immunity apply to single-state entities?

PARTIES

The parties are Petitioner/Plaintiff The Pillsbury Company, Inc.[1] and Respondent/Defendant The Port of Corpus Christi Authority. The Port of Houston Authority appeared as amicus curiae in support of Respondent in the Court of Appeals, but it was not a party below and is not a party before this Court.

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[1] Pursuant to Rule 29.1, Petitioner states that the non-wholly owned subsidiaries of Petitioner are as follows: Seretram, Pacific Star S.A. de C.V., Distribudora H.D. Mexico S.A. de C.V., Haagen-Dazs Japan Inc., Gigante Verde Y Associados S.N.C. de C.V., B.K. Do Brasil Limitada, and Burger King Sweden K.D.

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Petitioner, The Pillsbury Company, Inc., respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The "corrected opinion" of the court of appeals, reprinted as Appendix A ("App. A"), is reported at 66 F.3d 103 (5th Cir. 1995). The original opinion, reprinted as Appendix B ("App. B"), appears at 66 F.3d 103 (5th Cir. 1995) in the advance sheets.

The district court's Memorandum Opinion and Order entered January 31, 1994, reprinted as Appendix C ("App. C"), is unreported. The district court's Memorandum Opinion and Order entered May 27, 1994, reprinted as Appendix D ("App. D"), is unreported.

JURISDICTION

Petitioner seeks review of the judgment of the Court of Appeals for the Fifth Circuit, which was dated and entered on October 11, 1995. A timely petition for rehearing was filed on October 24, 1995, and denied on December 13, 1995. *See* App. G at G1. This petition for certiorari was filed within ninety days of that date, and this Court's jurisdiction is invoked under 28 U.S.C. § 1254(1). Petitioner filed suit in the district court under 28 U.S.C.

§§ 1332 and 1333. The district court assumed jurisdiction under 28 U.S.C. § 1332.

CONSTITUTIONAL PROVISION INVOLVED

The Eleventh Amendment to the United States Constitution provides, in pertinent part: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State . . . . "

STATEMENT OF THE CASE

Petitioner, The Pillsbury Company, Inc., alleging breach of contract and breach of a bailment, brought this action against the Port of Corpus Christi Authority, respondent, for damage to sugar stored in the Port's warehouses pursuant to a wharfage/storage contract between the Port and Pillsbury (App. D at D2). The Port of Corpus Christi Authority was created pursuant to Art. XVI, Sec. 59 of the Texas Constitution, which authorizes the creation of local navigation districts (App. D at D14). The Port admits that it receives no funds from the state treasury, that judgments rendered against it are not paid from the state treasury, and that the Port commissioners are not appointed by the state (App. D at D15-D16).

The Port filed a motion to dismiss the case on the ground that it was entitled to Eleventh Amendment immunity from suit in federal court (App. D). The district

court, treating this as a motion for summary judgment, held that the Port was not entitled to Eleventh Amendment immunity (App. D). The court found that the Port receives no funds from the state treasury and that judgments against the Port are not paid from the state treasury. In addition, the district court found that the Port may sue and be sued in its own name; may buy, sell, hold, and use property; may enter into contracts; and carries liability insurance that would cover any money judgment entered in this case. Further, the district court found that the Port was not an arm of the state, was autonomous, and was primarily concerned with local problems. Accordingly, the district court concluded that the Port was "sufficiently independent and distinct from the state" that it was not entitled to Eleventh Amendment immunity (App. D at D14-D19).

The district court certified its order concerning Eleventh Amendment immunity for interlocutory appeal under 28 U.S.C. § 1292(b) (Appendix E, "App. E"), and the Fifth Circuit granted the Port's petition for permission to appeal (Appendix F, "App. F").

The Fifth Circuit reversed the district court on the basis of its earlier decision in *Kamani v. Port of Houston Auth.*, 702 F.2d 612 (5th Cir. 1983), which held that the similarly-situated Port of Houston Authority was entitled to Eleventh Amendment immunity because it was "a creature of state law and a political subdivision of the state of Texas" (App. A at A2, 66 F.3d at 104). The Fifth Circuit distinguished *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. ___, 115 S.Ct. 394 (1994), this Court's recent decision holding that The Port Authority of New York and New Jersey was not entitled to Eleventh

Amendment immunity because judgments against it did not affect either state treasury, declaring that *Hess* was "a limited holding addressing the standard to be applied to bi-state entities not created pursuant to state statute" (App. A. at A3-A4, 66 F.3d at 104).

In a petition for rehearing, Pillsbury renewed its argument that *Kamani* was inconsistent with *Hess*, and that the Fifth Circuit should also follow this Court's earlier Eleventh Amendment decision in *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 401 U.S. 391 (1979). In response, the Fifth Circuit denied the petition for rehearing (App. G) and issued a "corrected" opinion adding a footnote stating, without explanation, that the Port would meet the Fifth Circuit's test for Eleventh Amendment immunity set forth in *Jacintoport v. Greater Baton Rouge Port Comm'n*, 762 F.2d 435 (5th Cir. 1985), *cert. denied*, 478 U.S. 1057 (1986), if the Court were to apply it (App. A at A4 n.5, 66 F.3d at 105 n.5). The Fifth Circuit, however, did not discuss whether the Port met this Court's criteria for Eleventh Amendment immunity announced in *Hess*, *Lake Country*, or any other decision (App. A at A3-A4, 66 F.3d at 104-05).

REASONS FOR GRANTING THE WRIT

I. THE FIFTH CIRCUIT, IN CONFLICT WITH THE FOURTH CIRCUIT, HAS SO LIMITED *HESS* THAT IT HAS VIRTUALLY NO APPLICATION IN THE FIFTH CIRCUIT.

A. The Decision Below Refused to Apply *Hess*

1. The Fifth Circuit's Decision

The court below based its decision on an earlier Fifth Circuit decision that the similarly-situated Port of

Houston Authority was entitled to Eleventh Amendment immunity because it was "a creature of state law and a political subdivision of the state of Texas." App. A at A3, 66 F.3d at 104 (citing *Kamani v. Port of Houston Auth.*, 702 F.2d 612, 613 (5th Cir. 1983) (citing *McCrea v. Harris County Ship Channel Nav. Dist.*, 423 F.2d 605 (5th Cir.), *cert. denied*, 400 U.S. 927 (1970))).

Almost a year before the Fifth Circuit's initial decision, this Court issued its most recent Eleventh Amendment opinion. *Hess v. Port Auth. Trans-Hudson Corp.*, 513 U.S. ___, 115 S.Ct. 394 (1994). This Court held that because the fundamental purpose of the Eleventh Amendment was to protect state treasuries, a governmental entity is not entitled to Eleventh Amendment immunity if a judgment against the entity would not affect the state treasury. *Id.* at 404-06. The Fifth Circuit distinguished *Hess* as "a limited holding addressing the standard to be applied to bi-state entities not created pursuant to state statute" and declined to follow it.

On rehearing, the Fifth Circuit issued a "corrected" opinion to add a footnote stating, without explanation, that even if the Fifth Circuit applied its *Jacintoport* test for Eleventh Amendment immunity, the Port would meet it. App. A at A4 n.5, 66 F.3d at 105 n.5 (citing *Jacintoport v. Greater Baton Rouge Port Comm'n*, 762 F.2d 435, 440-41 (5th Cir. 1985), *cert. denied*, 478 U.S. 1057 (1986)). The Fifth Circuit did not consider whether the Port would satisfy either the *Hess* or *Lake Country* criteria for Eleventh Amendment immunity. As explained in Part I.B, *infra*, the Port cannot do so.

2. Implications

By limiting the *Hess* analysis to agencies created by interstate compact, the decision below effectively eviscerates this Court's opinion. There are fewer than 25 interstate agencies under compacts adopted by any of the states in the Fifth Circuit. *See* W. Voit, *Interstate Compacts & Agencies* (The Council of State Governments 1995) (cataloging all interstate compacts and the agencies created under them). Indeed, there are fewer than 100 agencies created by interstate compact nationwide. *See id.* When these relatively small numbers are compared to the tens of thousands of potential Eleventh Amendment claimants that exist within a single state,[2] it can be seen that the

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[2] There is no published listing of "potential Eleventh Amendment claimants," but a brief examination of some of the numbers in a single state gives an idea of the relevant comparison. Texas has joined only 15 compacts that create interstate agencies. *See* Voit, *supra* at 86-87. The 1,060 Texas school districts, *see* 1994-95 *Texas Almanac* 594 (Dallas Morning News 1993), have school boards that are presumably similar to the one that unsuccessfully sought Eleventh Amendment protection in *Mt. Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 279-81 (1977). Texas has 254 counties and 1,176 incorporated municipalities. *See* 1994-95 *Texas Almanac, supra* at 525; *cf. Moor v. County of Alameda*, 411 U.S. 693, 717-721 (1973); *Lincoln County v. Luning*, 133 U.S. 529, 530 (1890). There are over 200 state boards and commissions in Texas. *See* 1994-95 *Texas Almanac, supra* at 503-518; *cf. Alabama v. Pugh*, 438 U.S. 781 (1978) (per curiam). The Texas Department of Mental Health & Mental Retardation operates 27 state hospitals, state schools, and state centers, and contracts with 35 community MHMR centers to provide services. *See* 1994-95 *Texas Almanac, supra* at 490; *cf. Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89 (1984). The decision below more seriously restricts this Court's

court below has deprived *Hess* of the vast majority of its precedential force.

B. If the Fifth Circuit Had Applied *Hess*, the Port Would Not Have Been Entitled to Eleventh Amendment Immunity

Because the court below felt that it was bound by one of its prior decisions directly on point, it never considered how *Hess* (or any of this Court's earlier Eleventh Amendment decisions) would have changed the result. Even the "corrected" opinion simply announces that the decision below is consistent with Fifth Circuit authority, with no indication that the court below considered any of this Court's Eleventh Amendment decisions. If the court below *had* considered these decisions, it would have seen that its *McCrea-Kamani* line of authority is directly contrary to this Court's precedents.

1. The Effect on the State Treasury

In *Hess*, this Court considered the various factors for Eleventh Amendment immunity announced in *Lake Country, supra*. Because these factors pointed in different directions, the Court turned to the Eleventh Amendment's "reasons for being" to guide its analysis. *See Hess*, 115 S.Ct. at 404. In particular, the Court held that an entity is not entitled to Eleventh Amendment immunity if a judgment against it would not affect the state treasury. *Id.* at

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precedent than would a decision limiting the *Pennhurst* analysis to state schools and hospitals!

404-406; *cf. id.* at 408 (O'Connor, J., dissenting). In the present case, the Port has admitted that it receives no state funds and that judgments against it are not satisfied from the state treasury (App. D at D17). Recognizing this exposure, the Port thus carried liability insurance that would cover any judgment entered in this case (see App. D at D16-D18). The *Hess* Court's reasoning accordingly requires that the Port be denied Eleventh Amendment immunity.

2. Control by the State

The *Hess* dissenters also recognized the value of providing guidance to the lower courts in cases where the *Lake Country* factors point in different directions. *See Hess*, 115 S.Ct at 410 (O'Connor, J., dissenting). However, the dissenters would have established a different test. As Justice O'Connor explained,

> the proper question is whether the State possesses sufficient *control* over an entity performing governmental functions that the entity may properly be called an extension of the State itself.

Id. (emphasis in original). Justice O'Connor elaborated on the application of this test in the next paragraph:

> The critical inquiry . . . should be whether and to what extent the elected state government exercises oversight over the entity. If the lines of oversight are clear and substantial – for example, if the State appoints and removes an entity's governing personnel and retains veto or approval power over an entity's undertakings –

> then the entity should be deemed an arm of the state for Eleventh Amendment purposes.

Id. at 411.

The state of Texas exercises no more control over port authorities in Texas than it does over counties and other political subdivisions that are undoubtedly not entitled to Eleventh Amendment immunity. The state does not appoint the ports' commissioners and the port authorities enjoy a great deal of freedom from state supervision (App. D at D16-D18). The state of Texas retains no veto or approval power over the ports' undertakings, and has frequently itself litigated disputes with port authorities in Texas (App. D at D19-D20). Indeed, the state of Texas in this context retains no "real, immediate control and oversight." *Hess*, 115 S.Ct. at 411 (O'Connor, J., dissenting).

3. Other *Lake Country* Factors

To the extent that the remaining *Lake Country* factors remain relevant, they too point against Eleventh Amendment immunity in the circumstances of this case. The Port's treatment under state law, for example, is as a "political subdivision," not as a part of "state government." The Texas Tort Claims Act (a limited waiver of the state's common-law immunity from tort) defines a "navigation district" like the Port as a "political subdivision" and "state government" as follows:

> "State government" means an agency, board, commission, department, or office, *other than a district created under Article XVI, Section 59, of the Texas Constitution*, that:

(A) was created by the constitution or a statute of this state; and

(B) has statewide jurisdiction.

Tex. Civ. Prac. & Rem. Code § 101.001(2)(B), 101.001(5) (emphasis added). Given such an express declaration by the Texas Legislature and the findings of the district court, the Port cannot qualify for Eleventh Amendment immunity as an "arm of the state." As Justice Rehnquist said for a unanimous Court in *Mt. Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 280 (1977), Eleventh Amendment immunity "does not extend to counties and similar municipal corporations."

Indeed, the district court carefully considered all of the *Lake Country* factors and found that the Port did not satisfy any of the criteria for Eleventh Amendment immunity. The criteria include whether the entity is considered a political subdivision instead of an arm of the state, whether the commissioners are appointed by the state, whether funding comes from the state, whether judgments against the entity are satisfied from the state treasury, whether the entity functions autonomously, and whether the entity is concerned with local rather than statewide issues. *Id.* at 401-02. The district court found the Port was a political subdivision, that the commissioners were not appointed by the state, that no funding comes from the state, that judgments against the Port are not satisfied from the state treasury, that the Port functions autonomously, and that the Port is concerned with local issues (App. D at D16-D20).

In sum, if the court below had applied *Hess* (or any prior decision in this Court's Eleventh Amendment jurisprudence), it would have reached the opposite result.

C. The Fourth Circuit Correctly Recognizes That The *Hess* Analysis Applies To Single-State Entities

The Fifth Circuit concluded that *Hess* applies only to bi-state entities. App. A at A3-A4, 66 F.3d at 104. This position directly conflicts with the well-reasoned conclusion of the Fourth Circuit in two recent decisions.

1. *Gray v. Laws* and *Ristow v. South Carolina Ports Auth.*

The Fourth Circuit, undertaking a detailed analysis, concluded that the principles of *Hess* applied equally to single-state entities. *Gray v. Laws*, 51 F.3d 426, 431-33 (4th Cir. 1995). In *Gray*, the Fourth Circuit reviewed *Hess* and noted this Court's focus on state treasury and state sovereignty concerns as fundamental to Eleventh Amendment inquiry. *Id.* at 432. The Fourth Circuit concluded that there was no logical reason that the factors recognized by this Court in *Hess* should be any less applicable in the single-state context. *Id.* at 432-33.

Furthermore, in a case on remand from this Court for further consideration in light of *Hess*, the Fourth Circuit recently reaffirmed this analysis. *Ristow v. South Carolina Ports Auth.*, 58 F.3d 1051, 1053 n.5 (4th Cir. 1995), *cert. denied*, 116 S.Ct. 514 (1995).

2. Other Circuits Implicitly Support the Fourth Circuit's Conclusion

The Second, Third, Seventh, and Eighth Circuits have implicitly agreed with the Fourth Circuit, citing *Hess* as authoritative in the context of single-state entities. *See Marbley v. Bane*, 57 F.3d 224, 233 (2d Cir. 1995); *Christy v. Pennsylvania Turnpike Comm'n*, 54 F.3d 1140, 1145 (3d Cir. 1995); *Matter of Merchants Grain, Inc.*, 59 F.3d 630, 632 (7th Cir. 1995); *Thomas v. FAG Bearings Corp.*, 50 F.3d 502, 506 (8th Cir. 1995).

3. The Fourth Circuit is Correct

Even though *Hess* involved a bi-state entity, nothing in this Court's Eleventh Amendment jurisprudence suggests as sharp a distinction between the analysis for bi-state and single-state entities as the Fifth Circuit indicates. The court below applied a different standard for Eleventh Amendment immunity for single-state entities: port authorities in Texas are entitled to Eleventh Amendment immunity because they are created by the state constitution and are political subdivisions of the state. App. A at A3-A4, 66 F.3d at 104. There may be some distinction between single-state and bi-state entities (insofar as the state's dignity could theoretically be impacted somewhat more in the single-state context), but the criteria for Eleventh Amendment immunity must nevertheless be uniform for both because no logical policy or other reason suggests the two should be analyzed any differently. *Gray*, 51 F.3d at 433. This Court relied on single-state authority when deciding *Hess*, and the lower courts repeatedly have applied this Court's bi-state *Lake*

Country decision in the single-state context. *See Hess*, 115 S.Ct. at 404-05. No logical policy or other reason exists for creating two lines of Eleventh Amendment jurisprudence for bi-state and single-state entities. *Gray*, 51 F.3d at 432-33.

D. The Inter-Circuit Conflict is Ripe for Resolution By This Court

1. The Number of Bi-State Entities is Fairly Small, Not Only in the Fifth Circuit, but Nationwide

As noted above, *see supra* section I.A.2, there are fewer than 25 interstate agencies under compacts adopted by any of the states in the Fifth Circuit and fewer than 100 agencies created by interstate compacts nationwide. The conflict between the Fourth Circuit and the court below thus addresses the question whether this Court's most recent Eleventh Amendment decision will have broad impact or will instead be restricted to a relatively trivial range of cases. If a decision of this court is to be confined to its narrow facts, this Court should be the one to so decide.

2. Different Analyses for Eleventh Amendment Immunity Will Result in Forum-Shopping

The need for uniformity in the application of the Eleventh Amendment is self-evident, for this issue goes to the very heart of our federal system. The balance of power between the states and the federal government should not depend on the circuit in which a case is filed.

The need for uniformity is particularly acute in the present context where interstate and international commerce are involved and opportunities for forum-shopping abound.

Lawsuits against port authorities in Texas are not limited to Texas, or even courts within the Fifth Circuit, because the ports can be sued in any state where their activities result in damage to cargoes. They are also subject to out-of-state suits for breaches of their contractual obligations with out-of-state entities. To consider one particularly relevant example, the Port of Houston Authority has been sued in federal court in New York for cargo damage, and the court held that it was not entitled to Eleventh Amendment immunity. *Marine Indem. Ins. Co. of Am. v. Yangming Marine Transp. Corp.*, 1990 A.M.C. 547, 551-52 (S.D.N.Y. 1989). If the decision below stands, parties that are able to do so will have every incentive to bring their actions against these port authorities in a court outside the Fifth Circuit. This Court should mandate the uniform application of the Eleventh Amendment to prevent this kind of forum-shopping.

3. The Decision Below Affects Interstate and International Commerce

The uniformity and predictability of the application of Eleventh Amendment immunity to state port authorities is vital to local, national, and international commercial transactions involving the United States. Domestic and foreign companies require assurance that United States courts will hold state port authorities accountable for their contractual obligations.

Under Texas law, a political subdivision waives its common-law immunity from liability when it contracts, but not its immunity from suit in state court. *Fristoe v. Blum*, 92 Tex. 76, 45 S.W. 998, 999 (Tex. 1898). Under the decision below, domestic and foreign companies have no legal recourse if port authorities in Texas fail to fulfill their contractual obligations.

The national importance of this issue is further illustrated by how confusion over the application of the Eleventh Amendment to port authorities in Texas and port authorities from other states can interfere with the nationwide jurisdiction of the Federal Maritime Commission (FMC). The tariffs of state port authorities must be filed with the FMC, which has jurisdiction over the nation's port authorities. The FMC has ruled that a port authority violates federal law by including provisions in its tariff which purport to exculpate it from liability for its own negligence. 46 C.F.R. 515.7; *see also Filing of Marine Tariffs by Marine Terminal Operator-Exculpatory Tariff Provisions*, Docket 86-15, F.M.C. ruling, 1987 A.M.C. 896 (1986). When the FMC has determined that it violates federal law for state port authorities to escape liability for their own negligence through their tariffs, the need for uniformity in Eleventh Amendment analysis becomes particularly acute given the need for uniform FMC jurisdiction over state port authorities.

II. IF THE COURT DECLINES TO RESOLVE THE CONFLICT BETWEEN THE FOURTH AND FIFTH CIRCUITS AT THIS TIME, THE COURT SHOULD NONETHELESS SUMMARILY REVERSE THE DECISION BELOW

Twenty-six years ago, the Fifth Circuit, in a case that did not mention the Eleventh Amendment, held that the predecessor of the Port of Houston Authority was "a creature of state law and a political subdivision of the State of Texas." *McCrea v. Harris County Houston Ship Channel Nav. Dist.*, 423 F.2d 605, 607 (5th Cir.), *cert. denied*, 400 U.S. 927 (1970). Thirteen years ago, the Fifth Circuit applied *McCrea*, without considering this Court's Eleventh Amendment jurisprudence, to hold that the Port of Houston Authority was entitled to Eleventh Amendment immunity "because [it] is 'a creature of state law and a political subdivision of the State of Texas.' " *Kamani v. Port of Houston Auth.*, 702 F.2d 612, 613 (5th Cir. 1983) (quoting *McCrea*, 423 F.2d at 607). Most recently, the court below, again without considering this Court's Eleventh Amendment jurisprudence, held that it was bound by *Kamani* to grant the Port Eleventh Amendment immunity because it "is factually and legally indistinguishable from the Port of Houston Authority." App. A at A3, 66 F.3d at 104.

The decision below demonstrates that the Fifth Circuit has a well-established line of cases holding that port authorities in Texas operating pursuant to Article XVI,

Section 59 of the Texas Constitution[3] are entitled to Eleventh Amendment immunity. As explained above, *see supra* section I.B, this result is plainly inconsistent with the majority's approach in *Hess*, the dissent's approach in *Hess*, and this Court's Eleventh Amendment jurisprudence in general. The Fifth Circuit has chosen to follow its own well-established precedents, which are directly on point, instead of determining the correct result with the guidance of this Court's more recent decisions.

Petitioner recognizes that " '[a] summary reversal . . . is a rare and exceptional disposition,' " *Mireles v. Waco*, 502 U.S. 9, 15 (1991) (Scalia, J., dissenting) (quoting R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice* 281 (6th ed. 1986)), but a lower court's adherence to its own precedents in the face of inconsistent decisions by this Court is one situation in which summary reversal is particularly appropriate. *See also* Sup. Ct. R. 10 ("court of appeals . . . has decided a federal question in a way that conflicts with applicable decisions of this Court").

Indeed, the present case is remarkably similar to *United States v. Nachtigal*, 507 U.S. 1 (1993). In *Nachtigal*, the Court summarily reversed the Ninth Circuit because it had followed one of its own precedents, which was directly on point, instead of determining the correct result under the guidance of a more recent decision of

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[3] In addition to Houston's and Corpus Christi's, other port authorities operating pursuant to Article XVI, Section 59 of the Texas Constitution include Freeport, Beaumont, and Brownsville.

this Court. Such a summary reversal reinforces the principle that this Court's decisions take priority over inconsistent decisions of the lower courts, even in the absence of an express overruling. This fundamental principle enables the Court to give broad guidance to the lower courts by deciding a relatively small number of cases that raise questions of general application. The court below has ignored this fundamental principle in the present case.

This case presents an important conflict between the Fourth and Fifth Circuits, and the lower court's rejection of the Fourth Circuit's position was an essential element of its decision. Nevertheless, this Court could summarily reverse the decision below without resolving the conflict, without extending (or even endorsing) the *Hess* decision in any way, and without announcing any new principles of law. This is because the court below not only explicitly rejected the application of *Hess*, it also implicitly rejected the application of this Court's Eleventh Amendment jurisprudence in its entirety. In view of the facts admitted by the Port and found by the district court, a relatively routine application of this jurisprudence points to reversal here.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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March 12, 1996

APPENDIX A

CORRECTED

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-20597

THE PILLSBURY COMPANY, INC.,

Plaintiff-Appellee,

versus

THE PORT OF CORPUS CHRISTI AUTHORITY,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Texas

(Filed Oct. 11, 1995)

Before JOLLY, BENAVIDES, Circuit Judges, and SHAW*, District Judge.

BENAVIDES, Circuit Judge:

Defendant-Appellee The Port of Corpus Christi Authority ("Corpus Port") appeals the district court's denial of its motion to dismiss for lack of diversity jurisdiction and/or motion for summary judgment alleging

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* Chief Judge for the Western District of Louisiana, sitting by designation.

that it is an "arm of the State of Texas" entitled to Eleventh Amendment immunity and not a "citizen" for purposes of diversity jurisdiction. We reverse the district court's ruling and dismiss for lack of jurisdiction.

FACTS AND PROCEDURAL HISTORY

The facts of the case are undisputed. The Pillsbury Company ("Pillsbury"), a Delaware corporation with its principal place of business in Minnesota, and the Corpus Port entered into a contractual arrangement concerning a shipment of bagged sugar consigned to Pillsbury. The shipment arrived at the Corpus Port in March 1991, and was allegedly damaged while being stored in the Corpus Port's cargo dock sheds (warehouses).

On March 8, 1993, Pillsbury sued the Corpus Port for breach of contract/bailment for the damage caused to the sugar stored at the Corpus Port. The Corpus Port filed a motion to dismiss for lack of diversity jurisdiction and/or motion for summary judgment, alleging that it was an "arm of the State of Texas," and therefore not considered a "citizen" for purposes of diversity jurisdiction. The Corpus Port also alleged that it was entitled to Eleventh Amendment immunity from suit in federal court.

After allowing the parties extra time for briefing the jurisdictional issue, the district court determined that the Corpus Port is not an arm of the State of Texas and thus, as a citizen within the meaning of 28 U.S.C. § 1332, is capable of supporting the exercise of the court's diversity jurisdiction.[1]

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[1] The court also ruled that it lacked admiralty jurisdiction because 1) the contract at issue did not involve a maritime

The Corpus Port filed a motion for reconsideration or, in the alternative, a motion for certification under 28 U.S.C. § 1292(b). The district court denied the motion for reconsideration, but certified the interlocutory order for immediate appeal. This Court subsequently granted the interlocutory appeal.[2]

DISCUSSION

The district court's finding that the Corpus Port is legally and factually indistinguishable from the Port of Houston Authority ("Houston Port") is unassailed in this appeal. Accordingly, we are bound by our decision in *Kamani v. Port of Houston Authority*,[3] in which we upheld an earlier decision finding the Houston Port "a creature of state law and a political subdivision of the State of Texas" entitled to Eleventh Amendment immunity. *Id.* at 613 (quoting *McCrea v. Harris County Houston Ship Channel Navigation Dist.*, 423 F.2d 605, 607 (5th Cir.), *cert. denied*, 400 U.S. 927, 91 S.Ct. 189, 27 L.Ed.2d 186 (1970)). Therefore, we find that the Corpus Port, like the Houston Port, is entitled to Eleventh Amendment immunity.

We reject Pillsbury's contention that the U.S. Supreme Court's decision in *Hess v. Port Authority Trans-*

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obligation to provide wharfage and 2) there was no evidence of a claim for damages arising from the breach of a severable maritime obligation of the contract.

[2] The Port of Houston Authority has filed a brief of *amicus curiae* in this appeal.

[3] 702 F.2d 612 (5th Cir. 1983)

Hudson Corp.[4] overrules our decision in *Kamani*. *Hess* is not broad enough to support Pillsbury's contention. We view *Hess* as a limited holding addressing the standard to be applied to bi-state entities not created pursuant to state statute. Because the Corpus Port and the Houston Port were both created and still operate pursuant to Article XVI, Section 59 of the Texas Constitution, *Hess* does not overrule *Kamani* or control the disposition of this appeal. Likewise we find *Jacintoport*, decided after *Kamani* by a panel of this Court and pertaining to the Eleventh Amendment exception status of a port created under Louisiana law and not Texas law, is of no benefit to Pillsbury.[5]

CONCLUSION

Having found that the Corpus Port is entitled to Eleventh Amendment immunity, we REVERSE the ruling of the district court and DISMISS Pillsbury's claim for lack of jurisdiction.

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[4] 115 S.Ct. 394, 130 L.Ed.2d 245 (1994).

[5] Even were we to determine that the application of the *Jacintoport* six-part test for determining Eleventh Amendment immunity is appropriate in this case, we would conclude upon the application of the *Jacintoport* test that the Corpus port is entitled to such immunity.

APPENDIX B

The PILLSBURY COMPANY, INC., Plaintiff-Appellee,

v.

The PORT OF CORPUS CHRISTI AUTHORITY, Defendant-Appellant.

No. 94-20597.

United States Court of Appeals,
Fifth Circuit.

Oct. 11, 1995.

Nonresident corporation brought action against Port of Corpus Christi Authority for breach of contract related to damage of goods stored in port warehouse. The United States District Court for the Southern Division of Texas, Sim Lake, J., denied defendant's motion to dismiss and motion for summary judgment, but certified interlocutory appeal. The Court of Appeal, Benavides, Circuit Judge, held that defendant was political subdivision of state and was therefore immune from suit under Eleventh Amendment.

Reversed and dismissed.

Appeal from the United States District Court for the Southern District of Texas.

Before JOLLY and BENAVIDES, Circuit Judges, and SHAW*, District Judge.

BENAVIDES, Circuit Judge:

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* Chief Judge of the Western District of Louisiana, sitting by designation.

Defendant-Appellee The Port of Corpus Christi Authority ("Corpus Port") appeals the district court's denial of its motion to dismiss for lack of diversity jurisdiction and/or motion for summary judgment alleging that it is an "arm of the State of Texas" entitled to Eleventh Amendment immunity and not a "citizen" for purposes of diversity jurisdiction. We reverse the district court's ruling and dismiss for lack of jurisdiction.

FACTS AND PROCEDURAL HISTORY

The facts of the case are undisputed. The Pillsbury Company ("Pillsbury"), a Delaware corporation with its principal place of business in Minnesota, and the Corpus Port entered into a contractual arrangement concerning a shipment of bagged sugar consigned to Pillsbury. The shipment arrived at the Corpus Port in March 1991, and was allegedly damaged while being stored in the Corpus Port's cargo dock sheds (warehouses).

On March 8, 1993, Pillsbury sued the Corpus Port for breach of contract/bailment for the damage caused to the sugar stored at the Corpus Port. The Corpus Port filed a motion to dismiss for lack of diversity jurisdiction and/or motion for summary judgment, alleging that it was an "arm of the State of Texas," and therefore not considered a "citizen" for purposes of diversity jurisdiction. The Corpus Port also alleged that it was entitled to Eleventh Amendment immunity from suit in federal court.

After allowing the parties extra time for briefing the jurisdictional issue, the district court determined that the Corpus Port is not an arm of the State of Texas and thus, as a citizen within the meaning of 28 U.S.C. Sec. 1332, is

capable of supporting the exercise of the court's diversity jurisdiction.[1] The Corpus Port filed a motion for reconsideration or, in the alternative, a motion for certification under 28 U.S.C. Sec. 1292(b). The district court denied the motion for reconsideration, but certified the interlocutory order for immediate appeal. This Court subsequently granted the interlocutory appeal.[2]

DISCUSSION

The district court's finding that the Corpus Port is legally and factually indistinguishable from the Port of Houston Authority ("Houston Port") is unassailed in this appeal. Accordingly, we are bound by our decision in *Kamani v. Port of Houston Authority*[3], in which we upheld an earlier decision finding the Houston Port "a creature of state law and a political subdivision of the State of Texas" entitled to Eleventh Amendment immunity. *Id.* at 613 (quoting *McCrea v. Harris County Houston Ship Channel Navigation Dist.*, 423 F.2d 605, 607 (5th Cir.), *cert. denied*, 400 U.S. 927, 91 S.Ct. 189, 27 L.Ed.2d 186 (1970)). Therefore, we find that the Corpus Port, like the Houston Port, is entitled to Eleventh Amendment immunity.

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[1] The court also ruled that it lacked admiralty jurisdiction because 1) the contract at issue did not involve a maritime obligation to provide wharfage and 2) there was no evidence of a claim for damages arising from the breach of a severable maritime obligation of the contract.

[2] The Port of Houston Authority has filed a brief of *amicus curiae* in this appeal.

[3] 702 F.2d 612 (5th Cir.1983)

We reject Pillsbury's contention that the U.S. Supreme Court's decision in *Hess v. Port Authority Trans-Hudson Corp.*[4] overrules our decision in *Kamani*. *Hess* is not broad enough to support Pillsbury's contention. We view *Hess* as a limited holding addressing the standard to be applied to bi-state entities not created pursuant to state statute. Because the Corpus Port and the Houston Port were both created and still operate pursuant to Article XVI, Section 59 of the Texas Constitution, *Hess* does not overrule *Kamani* or control the disposition of this appeal. Likewise we find *Jacintoport Corp. v. Greater Baton Rouge Port Commission*, 762 F.2d 435 (5th Cir.1985), *cert. denied*, 474 U.S. 1057, 106 S.Ct. 797, 88 L.Ed.2d 774 (1986), decided after *Kamani* by a panel of this Court and pertaining to the Eleventh Amendment exception status of a port created under Louisiana law and not Texas law, is of no benefit to Pillsbury.

CONCLUSION

Having found that the Corpus Port is entitled to Eleventh Amendment immunity, we REVERSE the ruling of the district court and DISMISS Pillsbury's claim for lack of jurisdiction.

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[4] ___ U.S. ___, 115 S.Ct. 394, 130 L.Ed.2d 245 (1994).

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

THE PILLSBURY COMPANY, INC.,	§	
	§	
Plaintiff,	§	CIVIL ACTION NO.
	§	H-93-0656
v.	§	
	§	
PORT OF CORPUS CHRISTI AUTHORITY,	§	(Entered
	§	Jan. 31, 1994)
	§	
Defendant.	§	
	§	

MEMORANDUM AND ORDER

Pending before the court are the Motion for Summary Judgment (Docket Entry No. 11) of plaintiff, the Pillsbury Company (Pillsbury), and the Motion to Dismiss (Docket Entry No. 15) and Motion for Summary Judgment (Docket Entry No. 12) of defendant, Port of Corpus Christi Authority (the Port). Pillsbury, a Delaware corporation with its principal place of business in Minnesota, argues that it is entitled to a judgment in the amount of $659,706.72, plus attorney's fees, because the Port either breached a maritime contract or committed a maritime tort by negligently allowing a substantial portion of a cargo of bagged sugar to become rain-water damaged while it was stored on Port premises as the subject of a bailment. The Port argues that it is entitled to a judgment that (1) no bailment was ever created, (2) it breached no

warranties expressed or implied in its contract with Pillsbury, and (3) the contract contains a valid exculpatory clause for the type of damage the cargo suffered.

Separately, the Port moves for dismissal of this action under Fed. R. Civ. P. 12(b)(1) because the court lacks subject matter jurisdiction. Specifically, the Port argues that the court lacks admiralty jurisdiction and that diversity of citizenship is unavailable because the Port is the alter ego of the State of Texas. Alternatively, citing the Eleventh Amendment to the United States Constitution, the Port argues that dismissal is appropriate because it is not subject to suit in any court of the United States.

On December 10, 1993, the parties presented oral argument on the Port's jurisdictional challenges. Because the hearing was inconclusive, the court allowed the parties to file supplemental briefing on the jurisdictional issues and reserved its decision until it had sufficient time to review the submissions of the parties. Additionally, because the Port's motion contains non-jurisdiction related arguments and relies on materials outside the complaint to advance those arguments, the court converted those portions into a motion for summary judgment pursuant to Fed. R. Civ. P. 12(c). (Docket Entry No. 32)

I. Subject Matter Jurisdiction

Pillsbury first argues that the court should not entertain the Port's motion to dismiss for lack of subject matter jurisdiction and Eleventh Amendment immunity because the motion was filed after the deadline established in the docket control order for dispositive motions. However,

"[i]t is axiomatic that a district court may inquire into the basis of its subject matter jurisdiction at any stage of the proceedings." *Menchaca v. Chrysler Credit Corp.*, 613 F.2d 507, 511 (5th Cir.), *cert. denied*, 101 S.Ct. 358 (1980). Thus, even though the Port's 12(b)(1) motion was filed after its Answer and its Motion for Summary Judgment the court will treat that motion as a timely suggestion that the court lacks subject matter jurisdiction over this action.

The Supreme Court has noted that, unlike a defect in the court's subject matter jurisdiction, a party can waive its right to assert Eleventh Amendment immunity by inaction. *See Blatchford v. Native Village of Noatak*, 111 S.Ct. 2578, 2584 n.3 (1991) (citing *Moe v. Confederated Salish & Kootenai Tribes*, 96 S.Ct. 1634 (1976), for the proposition that failure to raise Eleventh Amendment immunity in briefs or oral argument before the Supreme Court led to waiver of consideration of that issue). *But see Edelman v. Jordan*, 94 S.Ct. 1347, 1363 (1974) (Eleventh Amendment immunity can be raised for the first time on appeal even though it is not the equivalent of a true attack on the court's jurisdiction such that the court must raise it *sua sponte*). Here, the Port's failure to raise immunity in its initial motion for summary judgment does not preclude review of that issue because the Port preserved its right to advance the argument by mentioning it in its original answer. *See Mello v. Woodhouse*, 755 F. Supp. 923, 925-26 (D. Nev. 1991) (no waiver where defendant raised immunity in answer, alluded to the issue in briefs, but failed to expressly assert that the action was in fact barred in either a motion to dismiss or for summary judgment).

A. Admiralty

1. Breach of a maritime contract

The parties agree that they entered into a contractual arrangement concerning a shipment of bagged sugar consigned to Pillsbury and that the sugar arrived at the Port in March of 1991 aboard the M/V LACON. They also agree that the essential terms of that contract were established by a series of letters, faxes, telephone communications, and the Port's published tariff, even though the parties' negotiations concerning these documents related to a similar shipment of sugar aboard the M/V HAFNIA that never called at the Port.

The contract formed by these communications obligated Pillsbury to pay one dollar per ton of cargo for wharfage, nine cents per gross registered ton of the M/V LACON per day for dockage, a flat $150.00 dock cleaning fee, a flat $525.00 shed and/or wharf hire fee, and ten cents per net ton of cargo for each five-day period (or portion thereof) the cargo remained on Port premises in excess of the agreed free time of 45 days.[1] The jurisdictional question arises from the parties' dispute concerning the nature of the contract and the role each party played in performing that contract once the cargo had been unloaded from the vessel, delivered to Pillsbury, and placed in the sheds at the Port.

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[1] Pillsbury's acceptance increased the Port's original offer of 30 days free time to 45 days. This counter-offer was accepted by the Port in its confirmation.

A maritime contract can sustain admiralty jurisdiction. *New England Mutual Ins. Co. v. Dunham*, 78 U.S. (11 Wall.) 1, 26 (1870) ("[A]s to [jurisdiction over] *contracts*, . . . the true criterion is the nature and subject-matter of the contract, as whether it was a maritime contract, having reference to maritime service or maritime transactions." (emphasis in original)). The parties do not dispute that their contract includes agreements concerning wharfage and dockage, two traditional maritime elements. *See, e.g., Ex parte Easton*, 95 U.S. 68, 76-77 (1877) ("[T]he pecuniary charge for the use of the dock or wharf is called wharfage or dockage, and . . . it is clear that [such] a contract . . . is a maritime contract, and . . . cognizable in the admiralty. . . . "). However, mere inclusion of maritime elements is insufficient because a contract must be *wholly* maritime to support admiralty jurisdiction. *Id.* at 72 ("Maritime jurisdiction . . . in cases of contracts . . . is limited to such subjects as are purely maritime, and have respect to commerce and navigation within the meaning of the Constitution."); *The Ada*, 250 F. 194, 197-98 (2d Cir. 1918) (Rogers, J., concurring) ("The jurisdiction of the admiralty courts is restricted to maritime subjects. . . . For a contract to fall within the admiralty jurisdiction, it must concern transportation by sea, relate to navigation or maritime employment, or be one of navigation and commerce on navigable waters.").

"In determining whether a contract be of maritime nature . . . the true test is the subject-matter . . . the nature and character of the work to be done." *State Industrial Comm'n v. Nordenholt Corp.*, 42 S.Ct. 473 (1922). *Accord, Exxon Corp. v. Central Gulf Lines, Inc.*, 111 S.Ct. 2071, 2077 (1991) ("[L]ower courts should look to the subject matter

of the . . . contract and determine whether the services performed . . . are maritime in nature."). The Port argues that its contract with Pillsbury fails to satisfy this test because the nature and character of work it was to perform under the contract includes the decidedly nonmaritime duty to provide a storage facility for landed cargo. *See, e.g., Howmet Corp. v. Tokyo Shipping Co.*, 320 F. Supp. 975, 977-78 (D. Del. 1971) ("[A]n action for nonperformance or faulty performance of a storage contract is nonmaritime in nature and does not fall within maritime jurisdiction.").

The Port recognizes that a contract need not literally be entirely maritime to support jurisdiction despite the tenor of the Supreme Court's opinions. To satisfy the "wholly maritime" requirement a contract must be one in which the maritime elements give that character to the whole. *See, e.g., The Ada*, 250 F. at 198 (Hough, J., concurring) ("The rule that a contract, to be maritime, must be 'wholly maritime,' means that the principal subject-matter of agreement gives character to the whole.") Admiralty jurisdiction will be extended (1) to the entire contract if all of the nonmaritime elements are merely incidental, and (2) to the maritime elements of a contract in which the nonmaritime elements, though not incidental, are severable and capable of separate adjudication. *See, e.g., Kuehne & Nagel (AG & CO) v. Geosource, Inc.*, 874 F.2d 283, 290 (5th Cir. 1989); *United Fruit Co. v. United States Shipping Bd. Merchant Fleet Corp.*, 42 F.2d 222, 224 (D. Mass. 1930).

The parties agree that any water damage attributable to the Port occurred after (1) the stevedoring company hired by Pillsbury had unloaded the cargo, (2) Pillsbury

(or its agent) had accepted delivery of the cargo as consignee, and (3) the cargo had been placed in the Port's covered sheds.[2] Thus, admiralty jurisdiction can only exist if the Port's obligation to provide space in these sheds is incidental to a contract that is principally maritime.[3] Pillsbury cites three cases to support its argument that a covenant to provide a place to store landed cargo can be incidental to a maritime contract for wharfage and dockage: *Marubeni-Iida (American), Inc. v. Nippon Yusen Kaisha*, 207 F. Supp. 418 (S.D.N.Y. 1962); *Hoogovens Estel Verkoopkantoor, B.V. of Ijmuiden v. Ceres Terminals, Inc.*, 1984 A.M.C. 1417 (S.D.N.Y. 1984); and *Moore-McCormack Lines, Inc. v. International Terminal Operating Co. (I.T.O.)*, 619 F. Supp. 1406 (S.D.N.Y. 1985).

Marubeni-Iida began as a suit by a consignee of cargo, Marubeni-Iida, against a steamship company, N.Y.K. Line, for breach of an ocean bill of lading by delivering the cargo in a water-damaged condition. N.Y.K. Line impleaded Universal Terminal & Stevedoring alleging that the cargo was damaged by flooding on the wharf

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[2] Pillsbury acknowledges that most, if not all of the damage accrued after delivery had been effected and the cargo had been placed in the sheds. *See, e.g.*, Plaintiff's Motion for Summary Judgment, Docket Entry No. 11 at 1-2 ("The cargo was *delivered* in good order and condition. . . . No exceptions were made by any party concerning the sugar's good condition on *delivery*. . . . During the storage period, water damaged the cargo due to leaking roofs in the warehouses." (emphasis added)).

[3] A finding of severability would only afford admiralty jurisdiction if the damage that accrued during the performance of the maritime obligation was capable of separate adjudication from the damage that accrued during the performance of the nonmaritime obligation. That situation does not exist here.

after being unloaded by Universal. 207 F. Supp. at 418-19. The court first held that the long-term contract between Universal and N.Y.K. Line was maritime since it obligated the former to provide wharfage as well as to discharge and deliver cargo.[4] Universal argued that the third-party action against it should be dismissed because N.Y.K. Line's third-party complaint alleged that the damage occurred while the cargo was stored on land. After noting that courts had not yet harmonized their positions on cargo damage sustained while "held in a dock warehouse prior to loading," the court concluded that it is "more reasonable to hold that if the cargo is on the wharf as an *incident to maritime carriage* . . . the action is within the admiralty jurisdiction." *Id.* at 419 (emphasis added).

When read in a vacuum this pronouncement appears to favor Pillsbury's argument. However, to properly evaluate this holding it is necessary to consider the relationship between the parties. The contract at issue in *Marubeni-Iida* was between an ocean carrier and a terminal operator. One commentator, when examining the question of admiralty jurisdiction over contracts between terminal operators and other entities involved in marine transportation, has observed that

> [i]n the eyes of the law, the terminal is the chameleon of the maritime industry. The law treats the terminal at various times, and occasionally at the same time, as an ocean carrier, an

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[4] "Both the loading and unloading of cargo and the furnishing of wharf facilities are maritime services. The contract between N.Y.K. Line and Universal to furnish these facilities is therefore a maritime contract." *Id.* at 419.

> Interstate Commerce Commission (ICC) common carrier, a warehouse, a common-law bailee, an agent of an ocean carrier, an agent of an ICC common carrier, an agent of a cargo shipper, and an agent of a cargo consignee.

Chester D. Hooper, *Legal Relationships: Terminal Owners, Operators, and Users*, 64 **Tul. L. Rev.** 595 (1989). The description of the relationship between the parties, therefore, does not end with recognition of the fact that one party is a terminal operator.

The contract in *Marubeni-Iida* not only obligated the terminal operator to provide wharfage but also to perform traditional stevedoring services. In this role the terminal acted as the carrier's agent in discharging the cargo under its ocean bill of lading. *See Leather's Best, Inc. v. S.S. MORMACLYNX*, 451 F.2d 800, 807 (2d Cir. 1971) (an ocean bill of lading ordinarily "continues to govern the relationship between a shipper and a carrier after discharge but before delivery."). *See also Tapco Nigeria, Ltd. v. M/V WESTWIND*, 702 F.2d 1252 (5th Cir. 1983) (describing a carrier's duty to deliver and unusual circumstances exonerating a carrier from liability for negligent stevedoring). Properly viewed in context, the court merely concluded that jurisdiction would be proper if the cargo was damaged during the terminal operator's performance as the carrier's agent of maritime services that were directly related to fulfilling the carrier's responsibility under the bill of lading.[5] Because the record failed

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[5] This is the accepted view of a stevedore's role. *See, e.g., La Salle Mach. Tool, Inc. v. Maher Terminals, Inc.*, 611 F.2d 56, 59 n.4 (4th Cir. 1979) ("[T]he stevedore has historically been

to demonstrate when the damage occurred, the court was willing to exercise admiralty jurisdiction over the action unless "the facts developed at the trial indicate that the damage occurred under circumstances not cognizable in admiralty." *Marubeni-Iida*, 207 F. Supp. at 420. *Marubeni-Iida* thus stands for the proposition that admiralty jurisdiction over an action between a carrier and its stevedore for failure to properly perform the ocean carrier's maritime obligation under the bill of lading to discharge and deliver the cargo is proper, even though the contract included the incidental shoreside activity of storing the landed cargo.

The key element in the other cases cited by Pillsbury was the relationship between the nonmaritime service and the provider's role in performing the maritime duty to discharge and deliver the cargo. In *Moore-McCormack Lines v. I.T.O.* the court rejected the magistrate's finding that the contract between the ocean carrier and its stevedore/terminal operator was severable into maritime and nonmaritime obligations. It explained that I.T.O. had "agreed to load and discharge cargoes for [Moore-McCormack's] vessels . . . and to receive and deliver those cargoes." 619 F. Supp. at 1408. The court then characterized the parties' relationship as follows:

> The nature and character of the . . . contract is not for storage. I.T.O.'s duties include the following functions traditionally performed by or for an ocean carrier of goods: To supply clerical

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considered to occupy a special relationship with the carrier, and his services in loading the ship fulfill the carrier's responsibility under the contract of carriage." (citation omitted)).

> personnel to record delivery and receipt of cargo; to sort and stack cargo; to make repairs to cooperage, rebag goods, etc.; to receive and tier outbound cargo; to break down cargo according to lot designations; to load and unload trucks and harborcraft; and to perform cleaning and general housekeeping on the piers. The storage that does occur under the contract is incident to the performance of the numerous maritime services undertaken for the ocean carrier by I.T.O.

619 F.2d at 1409. This holding is consistent with the view that a contract containing a mixture of nonmaritime, land-based storage and maritime services is nonetheless maritime if the storage is incident to provision of cargo-transportation related maritime services.

In *Hoogovens* a shipper of steel coils sued the stevedore/terminal operator it hired to discharge the cargo and "to store the coils in its terminal on the pier until they were picked up by the consignee." 1984 A.M.C. at 1421 (emphasis added). The party to whom the stevedore's contractual obligation flowed was not the carrier but the shipper. Nonetheless, because the stevedore/terminal operator was obligated to perform maritime services with respect to the transportation of cargo, *i.e.*, discharge and delivery, the court held that admiralty jurisdiction was proper because the covenant to store landed cargo "was incidental to the *unloading*."[6]

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[6] *Hoogovens*, 1984 A.M.C. at 1421 (emphasis added). Although the damage in *Hoogovens* began to accrue while the cargo was being unloaded and handled on the pier prior to storage, that fact is irrelevant to determination of the nature and character of the work to be performed under the contract.

Pillsbury recognizes that its contract with the Port did not involve any cargo-transportation related maritime services. Nonetheless, Pillsbury asks the court to find that the Port's nonmaritime obligation to provide storage space is merely incidental to its maritime obligation to provide wharfage. The Port, citing *Howmet Corp. v. Tokyo Shipping Co.*, 320 F. Supp. 975, 977-78 (D. Del. 1971), counters that a covenant to provide storage has been found insufficiently incidental to an agreement to provide wharfage to support admiralty jurisdiction. In *Howmet* the court explained that

> "[w]harfage" is the fee charged for the temporary use of a dock furnished in the ordinary course of navigation to a ship for the purpose of mooring in safety in order to load and unload cargo, to receive and land passengers, to make temporary repairs and to refuel, resupply and reprovision.

320 F. Supp. at 978. The court concluded that a covenant for storage is not an essential incident to wharfage because "all of the services embraced in wharfage are intimately related to and are essential incidents to a ship in the ordinary course of navigation, . . . [but w]harfage does not extend to the storage of cargo, as this service is not an essential incident to navigation." *Id.*

Moore-McCormack v. I.T.O., 619 F. Supp. at 1409 ("That the magistrate found that the losses occurred during the storage of the cargo, *i.e.*, after discharge and before delivery to the consignee, or prior to loading . . . is essentially irrelevant. . . . [T]he jurisdictional inquiry begins and ends with the subject matter of the contract.").

Howmet is neither the only nor the first case to examine the relationship between wharfage on the one hand and transportation and storage of cargo on the other. The most instructive of the early cases to consider this issue are the two opinions in *Evans v. New York & P. S.S. Co., Ltd.*, 145 F. 841 (S.D.N.Y. 1906) (Adams, J.) and 163 F. 405 (S.D.N.Y. 1906) (Hough, J.). In *Evans* the consignee of a shipment of rubber sued the carrier and a wharfinger/terminal operator for breach of contract by failing to deliver some of the consignment. The complaint failed to establish which party was actually at fault: The carrier blamed the terminal operator, alleging that it had completed its obligations under the bill of lading by delivering the entire shipment to the terminal's warehouse, while the terminal operator argued that it delivered all of the rubber that the carrier had delivered to it. Judge Adams, who decided the jurisdictional question on the strength of the pleadings, overruled the terminal operator's objections to admiralty jurisdiction, stating: "The case at bar seems to be of a maritime character as the delivery was to be completed through the [terminal operator]. . . . " 145 F. at 843.

The facts developed at trial in *Evans* differed materially from those alleged in the complaint. The entire shipment of rubber was unloaded from the vessel and placed for safekeeping in an enclosed room within the wharfinger/terminal operator's warehouse on a Friday afternoon pursuant to an agreement between the carrier and the terminal operator. No warehouse receipts were issued, but the carrier and terminal operator had an ongoing contractual arrangement that provided for both wharfage and the use of the warehouse. 163 F. at 405-06.

The contract obligated the terminal operator to maintain security – which it claimed to have done – but the cargo was stolen during the weekend, *i.e.*, post-discharge but pre-delivery. *Id.* at 406. Judge Hough found that the carrier could have, but did not, discontinue its obligation to effect a proper delivery to the consignee under the bill of lading by placing the cargo in actual storage on the consignee's account. Most persuasive in arriving at this conclusion was the fact that the *carrier,* not the terminal operator, ultimately made delivery of the goods that were not stolen. *Id.* On the basis of these newly established facts Judge Hough re-decided the question of jurisdiction and concluded:

> Exceptions to this libel were overruled in 145 Fed. 841, upon the ground that on the allegations of the libel there had been a delivery of the rubber to the [terminal operator] in order that the latter might in turn deliver to the [consignee], which fact rendered the matter one of admiralty jurisdiction; *the storage being incident to the contract of carriage.* I do not think that the evidence sustains this allegation. . . . It seems clear that neither the [consignee] nor the steamship company could have maintained an original suit in admiralty against the [terminal operator], because the negligence resulting in the disappearance of the rubber from the land warehouse did not give rise to a maritime tort, and *neither was the contract between shipowner and warehousemen a maritime contract.*

Id. at 407 (emphasis added).

Howmet and *Evans* are consistent with those cases that characterize the obligation to provide wharfage as

nothing more than a covenant to ensure that the offered berth is a safe place to conduct other necessary maritime services.[7] Thus, even if the Port's obligation to provide wharfage was the main purpose of Pillsbury's contract with the Port, the nature of that maritime service was only to maintain a safe platform from which others could provide additional maritime services to the vessel. Notably lacking from this description of the Port's duties is the obligation to provide any maritime service directly relating to the marine transportation of the cargo. *Cf. Luvi Trucking, Inc. v. Sea-Land Service, Inc.*, 650 F.2d 371, 373 (1st Cir. 1981) ("[C]ontracts involving cargo are maritime only to the extent the cargo is on a ship or being loaded on or off a ship."). The Port's only contractual obligation relating to the cargo was the entirely land-based obligation to provide a safe place for the cargo to be stored once discharge by stevedores and delivery to Pillsbury had been accomplished. *Howmet* and *Evans* provide ample authority for the Port's argument that providing storage in this situation was not a mere incident of the Port's maritime obligation to provide wharfage.

Because the court concludes that the contract between Pillsbury and the Port contains the nonmaritime element of storage that is not a mere incident to a primary maritime obligation, and because the damages did

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[7] *See, e.g., Eastern Massachusetts St. Ry. Co. v. Transmarine Corp.*, 42 F.2d 58 (1st Cir.), *cert. denied*, 51 S.Ct. 86 (1930) (exercising jurisdiction over suit for breach of covenant to maintain a safe berth in a lease of a wharf [ordinarily nonmaritime] since the covenant was both identical to a maritime contract for wharfage and severable from the rest of the lease).

not accrue during the performance of a separately adjudicable maritime phase of the contract, the court concludes that the contract is incapable of supporting admiralty jurisdiction.

2. Jurisdiction based on a maritime tort

The Fifth Circuit has reaffirmed that two requirements must be met before a party may successfully invoke admiralty jurisdiction based on a marine tort: "the damage or injury must take place on navigable waters . . . [*and*] the wrong must have a 'significant relationship to traditional maritime activity." *Palmer v. Fayard Moving & Transp. Corp.*, 930 F.2d 437, 439 (5th Cir. 1991). It is undisputed that all of the damage attributable to the Port occurred as a result of defects in the Port's covered storage sheds. In determining whether admiralty jurisdiction exists those sheds are considered land-based structures despite the fact that they extend over water and are used to facilitate maritime commerce. *See, e.g., Victory Carriers, Inc. v. Law*, 92 S.Ct. 418, 425 (1971) (declining to extend admiralty tort jurisdiction to personal injuries sustained by longshoreman working on piers and docks); *Thomson v. Chesapeake Yacht Club, Inc.*, 255 F. Supp. 555 (D. Md. 1965) ("[P]iers, docks, wharves and similar structures extending over navigable waters are extensions of land, though their use and purpose be maritime.").

Though admiralty jurisdiction may be proper over a maritime tort even when the negligent act took place on land, the court has found no cases upholding admiralty jurisdiction where, as here, the action involves a land-

based shipper or consignee suing a land-based terminal operator for damages to a landed cargo caused by rain water that allegedly passed through the roof of a land-based structure. *See Schmoll Fils, Inc. v. S.S. FERNGLEN*, 1949 A.M.C. 756, 757 (S.D.N.Y. 1949) (allegation that pier owners failed to furnish protection from water damage on the pier did not state a maritime tort). *Cf. Whitcombe v. Stevedoring Svcs. of America*, 2 F.3d 312, 314-15 (9th Cir. 1993) (no maritime tort occurred where cargo was damaged when container destined for ocean voyage fell to the ground prior to loading); *Roco Carriers, Ltd. v. M/V NURNBERG EXPRESS*, 899 F.2d 1292, 1294-95 (2d Cir. 1990) ("However, inasmuch as [Roco Carriers' conversion] claim against [the crating and carting agent] arose while the cargo was on land, Roco's claim . . . is grounded on state law and not within federal admiralty jurisdiction."). The court therefore concludes that admiralty jurisdiction is not available to resolve a tort action arising from these facts.

B. Diversity jurisdiction

Having concluded that admiralty jurisdiction does not exist the court must determine whether it can exercise diversity jurisdiction. "It is well established that a state is not a 'citizen' for purposes of diversity jurisdiction." *Tradigrain v. Mississippi State Port Authority*, 701 F.2d 1131, 1132 (5th Cir. 1983). Although the *Tradigrain* court observed that the inquiry into the availability of diversity jurisdiction over a state agency is nearly identical to the inquiry conducted when examining whether that entity is entitled to immunity from suit in federal court under the

Eleventh Amendment, there are two important distinctions between these analyses. First, as discussed *supra* at page 3, a jurisdictional defect cannot be waived while the right to assert immunity can. Second, the burden of proof lies with different parties. When a defendant "challenges the existence of subject matter jurisdiction in fact [as opposed to facially, *i.e.*, attacking the pleadings' allegation of jurisdiction] . . . matters outside the pleadings . . . are considered . . . and plaintiff bears the burden of proof that jurisdiction does in fact exist." *Menchaca v. Chrysler Credit Corp.*, 613 F.2d 507, 511 (5th Cir.), *cert. denied*, 101 S.Ct. 358 (1980). Conversely, since a party asserts Eleventh Amendment immunity as an affirmative defense, "it is ultimately 'the defendant [that] must prove its entitlement to immunity by a preponderance of the evidence.' " *ITSI TV Productions v. Agricultural Associations*, 3 F.3d 1289, 1291-92 (9th Cir. 1993) (noting that the issue was a matter of first appellate impression).

Neither party has cited a single case that decided the question of the status of the Port of Corpus Christi for diversity purposes.[8] Instead, both parties have attempted to analogize the Port's diversity status to cases with differing outcomes concerning the Port of Houston

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[8] The only case cited by either party even potentially relevant to the Port's status is *Dillard v. Nueces County Nav. Dist. No. 1 Term. Grain El. Proj.*, 214 F. Supp. 868 (S.D. Tex. 1963) (finding that the Port's nominal predecessor was a subscriber under Texas workers' compensation law). However, the *Dillard* court never discussed the propriety of exercising its subject matter jurisdiction over the Port, and the issue of Eleventh Amendment immunity was not raised.

Authority. Recognizing that Fifth Circuit authority entitles the Port of Houston to Eleventh Amendment immunity, the Port asks the court to hold it immune as well because it is practically identical to the Port of Houston. Pillsbury replies that to properly determine the Eleventh Amendment immunity and diversity status of the Port the court must conduct an independent assessment of that entity. Pillsbury relies upon the Fifth Circuit's pronouncement that

> sweeping comparisons [between purportedly similar state agencies performing analogous tasks] cannot substitute for a careful examination of the particular entity at issue. For example, the Port of Houston Authority [enjoys Eleventh Amendment] immun[ity] . . . while the Greater Baton Rouge Port Commission [doe]s not. . . .

McDonald v. Board of Mississippi Levee Comm'rs, 832 F.2d 901, 908 (5th Cir. 1987).

The Port's attempt to escape independent analysis through analogy of its position with that of the Port of Houston Authority is further thwarted because it is not clear that Texas law treats them the same. *Fireman's Fund Ins. Co. v. Department of Transp.*, 792 F.2d 1373, 1375 (5th Cir. 1986) (independent analysis of "parallel executive departments . . . [is unnecessary when] the State . . . treats all of the[m] . . . the same."). Neither the Port of Houston Authority nor the Port of Corpus Christi Authority was originally organized under Article XVI, § 59 of the Texas Constitution. Rather, the Port's predecessor, the Nueces County Navigation District Number 1,

> [a]fter an election on October 31, 1922, [ ] was *created* under Article 3, Section 52 of the Constitution and the General Laws of the State of Texas, Vernon's Ann.St. On April 23, 1931, [it] was duly *converted* to a Navigation District *operating* under Article 16, Section 59, of the Constitution of the State of Texas (Conservation and Reclamation) and the laws applicable thereto and so exists today.

Meaney v. Nueces County Nav. Dist. No. 1, 222 S.W.2d 402, 404 (Tex. Civ. App. – Austin 1949, writ ref'd) (emphasis added) (holding that legislative grant of eminent domain to the Port and other navigation districts includes the power to condemn either a fee simple or smaller estate). Converting from one constitutional provision to another allows "[w]ith minor exceptions, any Texas navigation district [to] avail itself . . . of any powers conferred on navigation districts under chapters 61, 62, and 63 of the Water Code." G. Sidney Buchanan, *Texas Navigation Districts and Regional Planning in the Texas Gulf Coast Area*, 10 **Hous. L. Rev.** 533, 542 (1973). According to Professor Buchanan, the availability of conversion accounts for the "great variety in the governing structures of Texas navigation districts . . . [because] the statutory conversion provisions . . . are worded to enable each type of navigation district to preserve its governing structure even if it elects to convert. . . . " *Id.* at 542-43.

On the record now before the court it is not possible to resolve the issue of subject matter jurisdiction because the parties have failed to identify which of the potentially relevant statutory and administrative provisions governing navigation districts actually govern the Port's structure and functions. By way of example the court notes

that Pillsbury urges a finding of no immunity in part because the Port is subject to suit in its own name. However, due to the ambiguity of the Port's status under Texas law after its voluntary conversion the court is unable to determine whether the Port is subject to suit "in any court *in* this state in the name of the district," pursuant to Tex. Water Code Ann. § 61.082 (presumably including federal courts), or only "in all courts *of* this state in the name of the district," pursuant to Tex. Water Code Ann. § 62.078 (implying the opposite result). *See Fylipoy v. Gulf Stevedore Corp.*, 257 F. Supp. 166, 168-69 (S.D. Tex. 1966) (holding the-predecessor of the latter statute effects no waiver of the predecessor of the Port of Houston Authority's Eleventh Amendment immunity).

II. Conclusion

After considering the subject matter of the contract between Pillsbury and the Port, the court concludes that the contract is not capable of supporting admiralty jurisdiction because it contains nonmaritime elements that are not merely incidental to a primarily maritime obligation, and although the nonmaritime elements might be severable, the parties do not dispute that any damages that arose during performance of the maritime obligation are not capable of being separately adjudicated. In accordance with traditional as well as recent conceptions of admiralty tort jurisdiction, the court concludes that no maritime tort was committed capable of supporting the exercise of its admiralty jurisdiction because the parties admit that all of the damage at issue in this case occurred while the cargo was on land.

The court cannot decide whether diversity jurisdiction exists because the record does not reflect the Port's current status under Texas law as an entity sufficiently separate from the state to satisfy the diversity of citizenship requirement. The court therefore **ORDERS** the Port to supplement the record by providing, within ten days from the entry of this Memorandum and Order, properly authenticated copies of all relevant statutes, session laws, administrative regulations, and charter or other documents that currently govern its activities and composition, together with a copy of any other matter relevant to the inquiry into the nature of its status as an alter ego of the state. Pillsbury will have ten days from the receipt of the Port's submission within which to respond by contesting the validity or content of the materials submitted by the Port. With these submissions the parties may provide five additional pages of briefing on the issues of diversity jurisdiction and Eleventh Amendment immunity.

SIGNED at Houston, Texas, on this 27th day of January, 1994.

/s/ Sim Lake
SIM LAKE
UNITED STATES DISTRICT JUDGE

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

THE PILLSBURY COMPANY, INC.,	§	
Plaintiff,	§	CIVIL ACTION
v.	§	NO.
	§	H-93-0656
PORT OF CORPUS CHRISTI AUTHORITY,	§	(Entered
	§	May 27, 1994)
Defendant.	§	

MEMORANDUM AND ORDER

Pending before the court are the Motion to Reconsider Opinion on Admiralty Jurisdiction (Docket Entry No. 38) of plaintiff, the Pillsbury Company (Pillsbury), and the Motion to Dismiss (Docket Entry No. 15) of defendant, Port of Corpus Christi Authority (the Port). In its motion to dismiss, the Port argued that the court lacked subject matter jurisdiction over the action.[1] On December 10, 1993, the court heard oral argument on the Port's jurisdictional challenges,[2] denied both Pillsbury's

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[1] Specifically, the Port argued that it was entitled to the immunity from suit in federal court provided the State of Texas under the Eleventh Amendment, and that neither admiralty nor diversity jurisdiction existed.

[2] When reviewing a motion to dismiss for lack of subject matter jurisdiction that appears to involve a need to determine factual matters not contained within the plaintiff's complaint "the district court must give plaintiff an opportunity for discovery and for a hearing that is appropriate to the nature of

and the Port's motions for summary judgment (Docket Entry Nos. 11 & 12), and partially converted the Port's motion to dismiss into a motion for summary judgment. (Docket Entry No. 32) Based on the parties' argument presented at the hearing and in papers supplementing their arguments the court, in a Memorandum and Order dated January 27, 1994 (*Memorandum I*; Docket Entry No. 37), determined that Pillsbury had not stated a claim within the admiralty jurisdiction of the federal courts, and ordered the Port to submit additional evidentiary materials to enable the court to determine whether diversity jurisdiction existed. Pillsbury not only responded to the Port's submission but also asked the court to reconsider its ruling that admiralty jurisdiction was lacking.

I. PILLSBURY'S MOTION TO RECONSIDER

The facts relevant to existence of admiralty jurisdiction are simply stated and, as stated, are undisputed. Pillsbury, as consignee of a cargo of bagged sugar, entered a contract with the Port obligating the Port to provide both wharfage to the vessel that carried the cargo and wharf-side covered storage for the cargo once it had been unloaded. Shortly after Pillsbury's stevedores finished unloading the cargo and placing it into the wharf-side sheds provided by the Port, rainwater began to leak through the roofs of several sheds. Many bags, even though covered with plastic, became damaged by water, dirt, and other contaminants. The parties' dispute centers

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the motion to dismiss." *Williamson v. Tucker*, 645 F.2d 404, 414 (5th Cir.), S.Ct. 396 (1981).

around the Port's liability for that portion of the damage caused by rainwater that leaked through the shed roofs.

In *Memorandum I* the court heeded the Supreme Court's instruction that when determining whether to exercise admiralty jurisdiction over a dispute concerning a contract, "lower courts should look to the subject matter of the . . . contract and determine whether the services performed under the contract are maritime in nature." *Exxon Corp. v. Central Gulf Lines, Inc.*, 111 S.Ct. 2071, 2077 (1991). The court concluded that the contract between Pillsbury and the Port contained both the maritime obligation to provide wharfage for the vessel and the nonmaritime obligation to provide storage for landed cargo where a contract contains both maritime and nonmaritime obligations, "[a]dmiralty jurisdiction will be extended (1) to the entire contract if all of the nonmaritime elements are merely incidental, and (2) to the maritime elements of a contract in which the nonmaritime elements, though not incidental, are severable and capable of separate adjudication." *Memorandum I*, at 6. The court determined that the parties, contract was incapable of supporting admiralty jurisdiction because the nonmaritime obligation of storage was neither merely incidental to nor severable from the maritime portion of the contract.

Pillsbury now argues that the court reached this result because it erroneously placed undue emphasis on Pillsbury's admission that

> most, if not all of the damage accrued after delivery had been effected and the cargo had been placed in the sheds. *See, e.g.*, Plaintiff's Motion for Summary Judgment, Docket Entry

> No. 11, at 1-2 "The cargo was delivered in good order and condition. . . . No exceptions were made by any party concerning the sugar's good condition on delivery. . . . During the storage period, water damaged the cargo due to leaking roofs in the warehouses." (emphasis added)

Memorandum I, at 7 n.2. Pillsbury contends that the court erred when it relied on these admissions because no "legal" delivery of the sugar could be effected in the United States because the sugar was travelling in-bond.[3] The court is not persuaded by this argument because admiralty jurisdiction would not exist in this case even if delivery had not occurred.

In *Memorandum I* the court determined that the parties' contract obligated the Port to perform both maritime and nonmaritime services. In order to support admiralty jurisdiction over such a contract Pillsbury must show that the maritime portions of the contract were either incidental to or severable from the nonmaritime portions. *Kuehne & Nagel (AG & CO) v. Geosource, Inc.*, 874 F.2d 283, 290

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[3] Pillsbury employs the term "in-bond" to mean that United States Customs allowed Pillsbury to land the cargo within the United States without duty because the goods were to be transported from Corpus Christi, Texas, into Mexico through a port of exportation (a term encompassing inland locations) without "coming to rest" (*i.e.*, being consumed or permanently warehoused) in the United States. The court notes, however, that "in-bond" is a term ordinarily reserved to describe goods that are to be transported under Customs seal from an initial U.S. entry port to a final U.S. destination for storage or consumption within the U S., while the term "in-transit" is applied to the situation Pillsbury describes. *See* 19 C.F.R. §§ 18.1 (defining merchandise travelling "in-bond"); 18.20(a) (defining merchandise travelling "in-transit").

(5th Cir. 1989). *When* the damage accrued is not relevant in making the jurisdictional inquiry whether a particular nonmaritime obligation is *incidental* to a primarily maritime contract.[4] Accordingly, the court did not rely on Pillsbury's admission concerning delivery during this portion of its analysis. Instead, as the court detailed in *Memorandum I*, it is the fact that the Port could fully perform its contract with Pillsbury without ever performing a maritime service relating directly to the cargo that distinguishes this case from those relied upon by Pillsbury[5] and that completes the parallel between this case

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[4] *Memorandum I*, at 11-12 n.6, quoting *Moore-McCormack Lines, Inc. v. International Terminal Operating Co. (I.T.O.)*, 619 F. Supp. 1406, 1409 (S.D.N.Y. 1985), *appeal granted*, 784 F.2d 1542 (2d Cir. 1986) ("that the losses occurred during the storage of the cargo, i.e., after discharge and before delivery to the consignee, or prior to loading . . . is essentially irrelevant. . . . [T]he jurisdictional inquiry begins and ends with the subject matter of the contract."). *Cf. Americas Ins. Co. v. J. Aron & Co.*, No. 93 CIV. 2503(MBM), 1994 WL 172407 (S.D.N.Y. May 4, 1994) (maritime insurance contract supported admiralty jurisdiction over coverage dispute even though loss occurred while petroleum products were temporarily stored on land during or after refining; the contract was essentially maritime and providing coverage for the products while temporarily on land implicated maritime commerce even though they were not travelling in maritime commerce when the loss occurred).

[5] *Marubeni-Iida (America), Inc. v. Nippon Yusen Kaisha*, 207 F. Supp. 418 (S.D.N.Y. 1962) (jurisdiction proper over damage to landed cargo where contract included maritime obligation to perform stevedoring services); *Hoogovens Estel Verkoopkantoor, B.V. of Ijmuiden v. Ceres Terminals, Inc.*, 1984 A.M.C. 1417 (S.D.N.Y. 1983) (same); and *Moore-McCormack Lines v. I.T.O.*, 619 F. Supp. 1406 (jurisdiction proper over damage to staged and landed cargoes where terminal operator was also obligated to perform a variety of marine transportation services).

and the two opinions in *Evans v. New York & P. S.S. Co., Ltd.*[6] and the instructive dictum in *Howmet Corp. v. Tokyo Shipping Co.*[7]

Only that portion of a claim arising from damage that is separately and distinctly attributable to a breach of the maritime obligations of a contract containing both maritime and nonincidental nonmaritime obligations may be maintained in admiralty.[8] Because Pillsbury admitted that

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[6] 145 F. 841 (S.D.N.Y. 1906) (Adams, J.) (exercising jurisdiction where it appeared that wharfinger would also *perform* delivery of landed cargo), and 163 F. 405 (S.D.N.Y. 1906) (Hough, J.) (no jurisdiction where facts at trial established that wharfinger was never obligated to *perform* delivery).

[7] 320 F. Supp. 975, § 77-78 (D. Del. 1971) ("Further, if the alternative claim against the City could be construed as a cause of action for breach of a storage contract, it would still not be within the admiralty jurisdiction of this Court."). This language demonstrates that the *Howmet* court never considered the consignee's claim against the city as wharfinger/terminal operator to be based on an implied contract as Pillsbury suggests. Rather, the court, in *dicta*, considered the relationship between the city's real maritime obligation to provide wharfage and an imaginary covenant to provide storage and concluded that a claim based on breach of the storage obligation would not support admiralty jurisdiction. While this fact does not undermine the analogy between that case and this one to the degree Pillsbury suggests, it partially explains why this court preferred not to base the entirety of its opinion on the hypothetical discussion in *Howmet*.

[8] In *Kuehne & Nagel* the Fifth Circuit examined claims arising from the breach of a multi-modal through bill of lading:

> [E]ven if the maritime and nonmaritime (overland) portions of the contract were separable, the forwarders have not limited their claim to damages accruing from breach of the maritime obligations.

all of the damages to its cargo occurred after delivery the court determined that an inquiry into the severability of the obligations in the parties, contract was unnecessary. *Memorandum I*, at 7 & n.2. Reliance on Pillsbury's admission was expedient and appears even now to have been justified. Nevertheless, Pillsbury's admission is superfluous; neither party has argued or presented evidence that the cargo sustained any damage as a result of a breach of a potentially severable obligation to provide wharfage. Because there is no evidence that the cargo suffered discrete and separately adjudicable damage as a result of a breach of the maritime obligation contained within the contract the court is persuaded that no inquiry into whether the cargo had been delivered is necessary to a resolution of the jurisdictional this case.

While the question whether delivery had occurred has no effect on the court's analysis in *Memorandum I*, Pillsbury's attempt to retract its admission concerning delivery is relevant to its belated invitation that the court find that admiralty jurisdiction would be proper even though the cargo was landed and stored in the Port's sheds because the cargo had to continue its international travel until *someone* delivered it at some later time in

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> Instead, more than half of the damages sought by the forwarders are attributable to [defendant's] failure to provide trucking services. . . . In other words, the forwarders seek adjudication of the obligations in the whole contract, not just the maritime portions.

874 F.2d at 290. Of course once admiralty jurisdiction is exercised over a portion of the claims arising in the case, a court may exercise supplemental jurisdiction over the nonmaritime portions of claims pursuant to 28 U.S.C. § 1367.

Mexico.[9] However, because the contract between Pillsbury and the Port had nothing to do with the obligation to complete this delivery, to accept Pillsbury's invitation the court would have to ignore the Supreme Court's instruction to focus on the nature of "the services performed *under the contract*" at issue.[10] Accordingly, the court declines Pillsbury's invitation.

Since the contract at issue does not primarily involve a maritime obligation to provide wharfage to which the nonmaritime obligation to provide storage is a mere incident, and because there is no evidence that a claim for damages arising from the breach of a severable maritime obligation of the contract capable of supporting the exercise of the court's admiralty jurisdiction has been or could be advanced, Pillsbury's Motion to Reconsider

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[9] For the sake of clarity the court observes that 19 C.F.R. § 18.23(b) provides a mechanism for the beneficial owners of merchandise originally entered as goods in-transit to change entry status by complying with the entry procedures detailed in 19 C.F.R. pts. 141 & 142. It appears, therefore, that it was not legally impossible for Pillsbury to have arranged for delivery of its sugar within the United States.

[10] *Exxon*, 111 S.Ct. at 2077 (emphasis added). *Cf. Luvi Trucking, Inc. v. Sea-Land Service, Inc.*, 650 F.2d 371, 374 (1st Cir. 1981) (contract that only obligated a trucking company to transport cargo overland from one pier to another was incapable of supporting admiralty jurisdiction because that obligation was merely collateral to other maritime contracts, even though cargo was destined to be further transported by ocean carriers). While the contract in this case also obligated the Port to provide wharfage, Pillsbury seeks to link only the performance of the nonmaritime obligation to provide storage to the separate contracts of others who would perform delivery.

Opinion on Admiralty Jurisdiction (Docket Entry No. 38) is **DENIED.**

II. DIVERSITY JURISDICTION

Because admiralty jurisdiction does not exist the court must consider whether diversity of citizenship will support the exercise of federal jurisdiction. The Port argues that 28 U.S.C. § 1332 does not provide this court with subject matter jurisdiction because the Port is an arm of the State of Texas.[11] Because neither party has cited a case in which the status of the Port of Corpus Christi for diversity purposes has been addressed, resolution of that issue requires the court to weigh competing arguments. The Port argues that *Kamani v. Port of Houston Authority*, 702 F.2d 612, 613 (5th Cir. 1983) (Port of Houston Authority is entitled to Eleventh Amendment immunity),[12] should be extended to it because the two

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[11] *E.g., Tradigrain, Inc. v. Mississippi State Port Authority*, 701 F.2d 1131, 1132 (5th Cir. 1983) ("It is well established that a state is not a 'citizen' for purposes of diversity jurisdiction. If suit is brought against an agency which is merely an alter ego of the state, it follows that federal jurisdiction is also lacking." (citations omitted)).

[12] Specifically, the court stated:

> Although the claim is in admiralty, the Eleventh Amendment sovereign immunity of the State of Texas and its instrumentalities stands. The state is free from a maritime tort claim absent its consent. Appellant's suit does not lie in this case unless the state of Texas has consented to the suit because the Port of Houston Authority is a "creature of state law and a political subdivision of the State of Texas." *McCrea v. Harris County Houston Ship Channel Navigation Dist.*, 423 F.2d

ports are legally and factually indistinguishable. Pillsbury adheres to its position that the court must independently determine whether the Port is a citizen by utilizing the factors applied by the Fifth Circuit in *McDonald v. Board of Mississippi Levee Comm'rs*,[13] *Jacintoport Corp. v. Greater Baton Rouge Port Comm'n*,[14] *Tradigrain*, and earlier cases[15] even if *Kamani* is still good law.[16]

605, 607 (5th Cir.), *cert. denied*, 91 S.Ct. 189 (1970). The Port of Houston Authority is the successor to the earlier Harris County ship Channel Navigation District, the subject of this earlier holding.

Id. Because "the analysis of an agency's status is virtually identical whether the case involves a determination of immunity under the eleventh amendment or a determination of citizenship for diversity jurisdiction," a conclusion that an entity enjoys Eleventh Amendment immunity is the equivalent of a finding that it is not a citizen. *Tradigrain*, 701 F.2d at 1132.

[13] 832 F.2d 901, 908 (5th Cir. 1987). Pillsbury's argument stems from the following language in *McDonald*:

> [S]weeping comparisons [between purportedly similar state agencies performing analogous tasks] cannot substitute for a careful examination of the particular entity at issue. For example, the Port of Houston Authority [enjoys Eleventh Amendment] immun[ity] . . . while the Greater Baton Rouge Port Commission [doe]s not. . . .

Id.

[14] 762 F.2d 435 (5th Cir. 1985), *cert. denied*, 106 S.Ct. 797 (1986).

[15] *See, e.g., Huber, Hunt & Nichols, Inc. v. Architectural Stone Co., Inc.*, 625 F.2d 22, 24-25 (5th Cir. 1980); *C.H. Leavell & Co. v. Board of Comm'rs of the Port of New Orleans*, 424 F.2d 764 (5th Cir. 1970).

[16] Pillsbury argues that the *Kamani* court's Eleventh Amendment immunity statement is not binding on this court

Even though *Kamani* does not literally control the outcome in this action because the Port of Houston Authority is not the defendant seeking to define itself as an alter ego of the state of Texas, the holding of *Kamani* can not be ignored because of *stare decisis*.

> *[S]tare decisis* . . . embraces a basic concept of fairness, the sense that people similarly situated should be similarly dealt with, and that judgments should be consistent, rather than arbitrary so that one may predict the consequences of contemplated conduct by reference to the treatment afforded similar conduct in the past.

Morris L. Cohen et al., How to Find the Law, 3 (9th ed. 1989). The Port's argument is not without force because no case in the Fifth Circuit has examined the applicability

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because it was either *dicta* or has been overruled. The statement that "[a]ppellant's suit does not lie in this case [because of the Eleventh Amendment] unless the state of Texas has consented to the suit" is not *dicta*; resolution of that issue was a necessary prerequisite to the exercise of the court's appellate jurisdiction. Neither was the holding in *Kamani* overruled *sub silentio* by *Jacintoport Corp. v. Greater Baton Rouge Port Comm'n*, 762 F.2d 435 (5th Cir. 1985), *cert. denied*, 106 S.Ct. 797 (1986). *Kamani* was written by Judge Williams, with Judges Rubin and Johnson on the panel, while *Jacintoport* was written by Judge Wisdom, with Judges Reavely and King on the panel. Two years after *Jacintoport* Judge King wrote that "the Port of Houston Authority is immune, [citing *Kamani*) . . . while the Greater Baton Rouge Port Commission is not, [citing *Jacintoport].*" *McDonald v. Board of Mississippi Levee Comm'rs*, 832 F.2d at 908 (King, J., writing for Williams and Garwood, JJ.). If *Jacintoport* had overruled *Kamani* one would expect there to be an expression of the disagreement between the two positions in *McDonald*, or at least an acknowledgement that *Kamani* had been modified by *Jacintoport*, but there is none.

of precedent to parallel agencies performing identical functions under virtually identical legal and factual circumstances.[17] Nevertheless, in the specific context of determining the Eleventh Amendment and diversity status of state agencies the Fifth Circuit has provided ample notice that agencies located within the same state may not rely upon a federal court to reflexively apply precedent.[18] The court concludes that a fair reading of Fifth Circuit authority requires it to independently assess the

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[17] In *Memorandum I* the court noted that Texas law does not treat all navigation districts equally. Because the record was inadequate for the court to determine whether Texas law treated the Port of Houston Authority and the Port the same the court requested additional information from the parties. As discussed below, that information establishes that for all practical purposes the Port is legally and factually indistinguishable from the Port of Houston Authority.

[18] *See, e.g., McDonald*, 832 F.2d at 908 (performing independent analysis of the Board of Mississippi Levee Commissioners despite invitation to analogize that entity to Mississippi's Port Authority and Highway Department previously found entitled to immunity); *Jacintoport*, 762 F.2d at 443 n.9 (court bolstered its thorough analysis of the Greater Baton Rouge Port Commission by comparing that entity to the Board of Commissioners of the Port of New Orleans, which had previously been found to be similarly distinct from the state, without hinting that the comparison could be a substitute for the analysis). *But cf. Fireman's Fund Ins. Co. v. Department of Transp.*, 792 F.2d 1373, 1375 (5th Cir. 1986) (while reticent to analogize the Louisiana Department of Transportation to its Texas counterpart because "each state decides the relationship between the state government and the public agencies it creates," the court suggested that where it was evident that a state treated all of its parallel departments the same, a careful analysis into the extent that their identical powers might differ could be avoided).

Port's diversity status under the Tradigrain analysis notwithstanding the holding of *Kamani*.[19]

In *Tradigrain* the Fifth Circuit provided a detailed blueprint for determining whether a particular state agency is sufficiently independent from the state to be treated as a citizen:

> In determining whether [a state] agency is an alter ego of the state . . . the essential question is whether the state is the real party in interest in the lawsuit. The resolution of this question is a matter of state law.
>
> . . . .
>
> If the agency's status is unclear, the court must look to any and all available sources for guidance. The court should consider whether the agency has been granted the right to hold and use property, whether it has the express authority to sue and be sued in its corporate name, the extent of its independent management authority, and "a factor that subsumes all others," the treatment of the agency by the state courts. When examining the extent of the agency's independent management authority,

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[19] Pillsbury argues that the court should simply decline to follow *Kamani* as did the court in *Marine Indemnity Ins. Co. of America v. Yangming Marine Transport Corp.*, 1990 A.M.C. 547 (S.D.N.Y. 1989) (Port of Houston Authority failed to demonstrate that it was entitled to Eleventh Amendment immunity in admiralty action despite citation to *Kamani*). Unlike the Southern District of New York, this court would not be free to discount Fifth Circuit authority even if the court believed that *Kamani's* reliance on *McCrea* as a substitute for a detailed analysis may have been misplaced since the Eleventh Amendment was not implicated in *McCrea*.

> the court should look to whether the agency has the power to make its own hiring decisions, the power to enter its own contracts, and the power to engage its own counsel. When examining the treatment of the agency by the state courts, this court has taken note of the fact that the state has sued the agency in its own courts, and of a state court holding that the statute of limitations, which normally did not run against the state itself, ran against the agency. Other relevant factors might include: (1) whether the state is responsible for the agency's debt; (2) whether the agency is primarily concerned with local, as opposed to statewide problems; and (3) the degree of general financial autonomy of the agency.

701 F.2d at 1132. If an examination of these factors demonstrates that an agency has little autonomy over its own fiscal and managerial affairs because it is dependent on state funds, or is allowed to act only under the direct supervision of the state, the analysis will point to a finding that the agency is an arm of the state and is entitled to Eleventh Amendment immunity. If, on the other hand, an agency has significant autonomy and suffers little interference and supervision from the state, the agency is less likely to be afforded Eleventh Amendment immunity.

> In a typical situation, some factors will suggest that the agency is a "citizen" while others will just as strongly suggest that the agency is merely an alter ego of the state. The court must balance these against each other in reaching its conclusion. It must never, however, lose sight of the primary question involved: whether the state is the real party in interest in the lawsuit nominally brought against the agency.

Id. at 1133. State agencies like the Port are creatures of state statutes; by granting or withholding authority to conduct their own affairs "each state decides the relationship between the state government and the public agencies it creates." *Fireman's Fund Ins. Co. v. Department of Transp.*, 792 F.2d at 1375. Therefore, "[t]he source material for the court's analysis is found in the state's constitutional, statutory and decisional law." *Tradigrain*, 701 F.2d at 1132.

The Port has now submitted uncontested evidence that following an election held on October 31, 1922, and pursuant to Tex. Const. art. III, § 52, and Acts 1909, 31st Leg., 1st C.S., ch. 15 (as amended by Acts 1921, 37th Leg., 1st C.S., ch. 39), the Nueces County Commissioners' Court ordered that the Nueces County Navigation District No. 1, whose borders would be coextensive with the borders of Nueces County, be established on November 13, 1922. At the same time the Commissioners, Court also ordered that $1 million of bonds of that district be issued, and that an ad valorem property tax sufficient to retire the principal and interest of those bonds be levied on all property within the district. On April 23, 1931, the district's governing body ordered that it be converted, pursuant to Acts 1929, 41st Leg., 1st C.S., ch. 103 (now codified at Tex. Water Code Ann. § 60.241), into a navigation district operating under Texas Const. art. XVI, § 59. The district's name was changed to the Port of Corpus Christi Authority by passage of Acts 1981, 6th Leg., 1st C.S., ch. 165, on May 20, 1981.

The Texas legislature has expressly granted both the port and the Port of Houston Authority[20] the right to hold and use property,[21] to sue and be sued in their corporate names,[22] to make their own hiring decisions,[23]

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[20] The Port contends that it is primarily governed by chapters 60 and 62 of the Texas Water Code due to the effect of Tex. Water Code Ann. §§ 60.245, 60.246(c). While Pillsbury does not dispute the Port's contention, the court observes that the supposedly "identically" situated Port of Houston Authority appears to be governed, at least in part, by chapters 60 and 63. *See, e.g., Jones v. Texas Gulf Sulphur Co.*, 397 S.W.2d 304, 307 (Tex. Civ. App. – Houston 1965, writ ref'd n.r.e.) (applying, *inter alia*, the predecessors of §§ 60.112 & 63.112 to the predecessor of the Port of Houston Authority); *Fylipoy*, 257 F. Supp. at 168-69 (interpreting the predecessor of § 63.112 as applied to the predecessor of the Port of Houston Authority). This distinction is of no consequence, however, because, as explained below, even if they are governed by different statutes the two entities are factually and legally identical in every relevant respect.

[21] Tex. Water Code Ann. §§ 62.105, 62.107; 63.155, 63.157. Both are expressly permitted to sell surplus lands. *Id.*, § 60.038.

[22] *Id.*, §§ 62.078; 63.112. In *Memorandum I* the court cited §§ 61.082 and 62.078 of the Water Code to illustrate the existence of divergent language in the several chapters of that Code that might apply to the Port. The ensuing reference to *Fylipoy* was misleading, however, because the *Fylipoy* court interpreted former Tex. Rev. Civ. Stat. Ann. art. 8263e § 75 (Vernon 1954) – the predecessor of current § 63.112, not of § 62.078 (successor to former art. 8263h § 46) as stated in *Memorandum I*. This error is immaterial, however, because both superseded provisions contained identical language when *Fylipoy* was decided, and the Port has submitted uncontradicted evidence that the subsequent alterations in language effected no substantive change in the meaning of the statute. *See* Defendant's Brief Clarifying its Legal Status (Docket Entry No. 39) at 3, and Exhibit G.

[23] *Id.*, §§ 62.076, 62.077; 63.099, 63.105, 63.107, and 63.109.

to enter contracts,[24] and to engage their own counsel.[25] Thus, both ports have significant managerial autonomy. Moreover, the Port has admitted that it "receives no funds from the treasury of the State of Texas," and that "[j]udgment[s] rendered against the Port are not paid from the treasury of the State of Texas."[26] The substance of these admissions establishes that the state is protected from responsibility for the ordinary debts of the Port.[27] The state's treasury also appears to be insulated from paying any of the Port of Houston Authority's debts.[28]

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[24] *Ids.*, §§ 62.107(b) (leases of realty); 62.109 - 62.114 (authority and governance of contracting under bids where improvements are the subject of the contract); 62.I13 ("All contracts made by the commission shall be in writing and . . . [a] copy . . . shall be filed with the county clerk); 63.153 ("A district may: . . . (6) enter into valid and binding contracts. . . . ").

[25] *Id.*, § 62.077(b); 63.106 & 63.109.

[26] Defendant's Responses to Plaintiff's Request for Admissions, attached as Exhibit C to Plaintiff's Motion for Summary Judgment (Docket Entry No. 11), Nos. 19 & 20, at 6.

[27] In addition to the Port's admission, the court notes that the combined effect of Texas Water Code Ann. §§ 60.101; 60.104; 60.105; 60.111; 60.122; 60.171; 60.174; 60.176; 60.179; 60.331-60.349; 62.073 - 62.075; and 62.191 - 62.208 makes it apparent that the obligations of navigation districts may only be secured by the operating revenues they generate, the ad valorem taxes they levy on the property located within their geographic confines, and the property and improvements they own.

[28] *See, e.g.*, § 63.221 (providing that "[a]ll expenses incurred in connection with the . . . maintenance of the district . . . shall be paid from the construction and maintenance fund" which is comprised of the Port of Houston's revenue from sources other than taxes and other funds used to form a sinking fund to retire outstanding bond obligations).

Additionally, the State of Texas neither acts as a depository for either port's funds nor controls their disbursements.[29] Nor does the state audit either port's accounting practices.[30] It is readily apparent, therefore, that both ports enjoy a great deal of fiscal freedom from state supervision.

Finally, despite the Texas Supreme Court's gratuitous statement concerning the Eleventh Amendment status of the Port of Houston Authority contained in *Guillory v. Port of Houston Authority*,[31] there is significant evidence that Texas courts consider navigation districts to be separate from the state. For example, in *Monsanto Co. v. Cornerstones Municipal Utility Dist.*, 865 S.W.2d 937 (Tex. 1993), the Texas Supreme Court grouped municipal utility districts created under Article XVI, § 59 with navigation districts created under that provision. After noting that none of these entities were expressly included in Tex. Civ. Prac. & Rem. Code Ann. § 16.061, it held that because these political subdivisions were not included in the general definition of state they were not entitled to the state's protection from generally applicable statutes of limitations.[32] To paraphrase the Fifth Circuit, it

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[29] Texas Water Code Ann. §§ 62.153 - 62.157; 63.222 & 63.223.

[30] *Id.*, §§ 62.158; 63.224.

[31] 845 S.W.2d 812, 815 (Tex. 1993) (while holding that the Port of Houston Authority is entitled to state sovereign immunity the supreme court acknowledged, as does this court, that the holding of *Kamani* is still entitled to precedential effect in federal courts within the Fifth Circuit).

[32] Specifically, the *Monsanto* court held that

> [t]o read "political subdivision" into "state" would by implication enlarge "state" and section 16.061 beyond

is obvious that the Texas Supreme Court would not have ruled that political subdivisions are subject to statutes of limitations if they were the same entity as the state, since § 16.061 provides that statutes of limitations do not run against the state. *C.H. Leavell & Co.*, 424 F.2d at 767. To further paraphrase C.H. Leavell, equally telling[33] is the fact that the state has litigated disputes concerning the extent of each port's ownership interest in lands granted to them by the state.[34] Finally, the Texas Supreme Court has also opined

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> their plain and ordinary meaning . . . Applying the ordinary meaning of "state" to section 16.061, we conclude that it was the intent of the legislature to include within "state" only those entities having statewide jurisdiction.

Id. at 940.

[33] The *C.H. Leavell* court considered the fact that Louisiana had instituted litigation against the Board of Commissioners of the Port of New Orleans (in an action concerning the Board's power to sublease port warehouse facilities) as important an indication of the Board's independent status as the fact that a prescriptive period was interrupted for the Board under circumstances in which the opposite treatment would have been accorded the state. *C.H. Leavell & Co.*, 424 F.2d at 766-67.

[34] *See Texas Parks & Wildlife Dept. v. Champlin Petroleum Co.*, 616 S.W.2d 668 (Tex. Civ. App. – Corpus Christi 1981, writ ref'd n.r.e.) (the Port and Champlin Petroleum Co. were co-plaintiffs in a declaratory judgment action against the Department; court held that Texas had conveyed a fee simple interest in the surface estate to the Port thus freeing the Port's grantee, Champlin, from having to pay Parks & Wildlife for a permit to dredge that land for navigational purposes); *State of Texas v. Harris County Houston Ship Channel Nav. Dist.*, 158 F.2d 861 (5th Cir. 1946) (State of Texas took an adversarial position against its co-defendant, the Port of Houston's predecessor, in a dispute over proceeds from the federal condemnation of land the state had granted to the port).

that navigation districts are primarily concerned with local, as opposed to statewide, problems:

> A political subdivision differs from a department, board or agency of the State. A political subdivision has jurisdiction over a portion of the State; a department, board or agency of the State exercises its jurisdiction throughout the state. Members of the governing body of a political subdivision are elected in local elections or are appointed by locally elected officials; those who govern departments, boards or agencies of the State are elected in statewide elections or are appointed by state officials. Political subdivisions have the power to assess and collect taxes; departments, boards and agencies do not have that power.

Guaranty Petroleum Corp. v. Armstrong, 609 S.W.2d 529, 531 (Tex. 1980) (Brownsville Navigation District is a political subdivision, not a "department, board, or agency of the state."). These statements are indicia that Texas courts do not view navigation districts as arms of the State of Texas.

Even though it appears that the Port is legally and factually indistinguishable from the Port of Houston Authority, which, under existing Fifth Circuit authority, is entitled to Eleventh Amendment immunity on the basis of the court's analysis, which is also mandated by Fifth Circuit precedent, the court holds that the Port is sufficiently independent and distinct from the state to be a citizen within the meaning of 28 U.S.C. § 1332.

III. CONCLUSION

After considering the additional argument submitted by Pillsbury, the court adheres to its conclusion that the contract between Pillsbury and the Port is not capable of supporting admiralty jurisdiction because it contains nonmaritime elements that are not merely incidental to a primarily maritime obligation and because although the nonmaritime elements might be severable, the parties do not argue that any damages arose during performance of the maritime obligation. Accordingly, Pillsbury's Motion to Reconsider Opinion on Admiralty Jurisdiction (Docket Entry No. 38) is **DENIED.**

Because the Port is not an arm of the State of Texas and is therefore a citizen capable of supporting the exercise of the court's diversity jurisdiction, the port's Motion to Dismiss (Docket Entry No. 15) is **DENIED** insofar as it attacks the ability of this court to exercise subject matter jurisdiction over this action.

SIGNED at Houston, Texas, on this 26th day of May, 1994.

/s/ Sim Lake
SIM LAKE
UNITED STATES DISTRICT JUDGE

APPENDIX E

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS HOUSTON DIVISION

THE PILLSBURY COMPANY, INC.	§	
VS.	§	C.A. NO. H-93-0656
PORT OF CORPUS CHRISTI AUTHORITY	§	(Entered June 20, 1994)

ORDER

ON THIS DAY, came on to be heard Defendant Port of Corpus Christi Authority's Motion for Reconsideration or, in the Alternative, Motion for Certification under 28 U.S.C. §1292(b), and the Court, having considered same, and the opposition and responses thereto, and the pleadings on file herein is of the opinion that the Port of Corpus Christi's Motion for Reconsideration should be **DENIED.** However, the Port of Corpus Christi's Motion for Certification under 28 U.S.C. §1292(b) should be **GRANTED.**

The undersigned is of the opinion that this Order involves a controlling question of law as to which there is a substantial ground for difference of opinion and that an immediate appeal from this Order as authorized by 28 U.S.C. §1292(b) may materially advance the ultimate termination of this litigation. It is, therefore, accordingly;

ORDERED that the Port of Corpus Christi Authority's Motion to Dismiss is certified for immediate appeal under 28 U.S.C. §1292(b).

SIGNED at Houston, Texas this 17th day of June, 1994.

/s/ Sim Lake
THE HONORABLE
SIM LAKE
UNITED STATES
DISTRICT JUDGE

APPENDIX F

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 94-00127
USDC No. CA-H-93-0656

THE PILLSBURY COMPANY, INC.,

Plaintiff-Respondent,

versus

PORT OF CORPUS CHRISTI AUTHORITY,

Defendant-Petitioner.

Petition for Permission to Appeal an Interlocutory Order

(Filed Aug. 19, 1994)

Before GARWOOD, WIENER and EMILIO M. GARZA, Circuit Judges.

BY THE COURT:

The petition of the Port of Corpus Christi Authority for permission to appeal, pursuant to 28 U.S.C. 1292(b), the interlocutory order certified by the district court on June 17, 1994, is GRANTED.

APPENDIX G

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-20597

THE PILLSBURY COMPANY, INC.,

Plaintiff-Appellee,

versus

PORT OF CORPUS CHRISTI AUTHORITY,

Defendant-Appellant.

Appeal from the United States District Court for the Southern District of Texas

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ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion 9-7-94, 5 Cir., ___, ___ F.3d ___)

(**12/13/95**)

Before JOLLY and BENAVIDES, Circuit Judges, and SHAW* District Judge.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the

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* Chief Judge of the Western District of Louisiana, sitting by designation.

Court having requested that the Court be polled on rehearing en banc, (FRAP and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Judges who are in regular active service not having voted in favor, (FRAP and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

/s/ Fortunato P. Benavides
FORTUNATO P. BENAVIDES
UNITED STATES CIRCUIT JUDGE